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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

## No. 110

THE ALTON RAILROAD COMPANY, ET AL.,
*Appellants,*

*vs.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, AN INDIVIDUAL DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE,
*Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

## APPELLANTS' BRIEF.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

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## APPELLANTS' BRIEF.

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### Opinions Below.

The Opinion of the District Court appears in 36 F. Supp. 898 and R. 29. The Report of the Interstate Commerce Commission is in 8 M. C. C. 469 and R. 8.

### Jurisdictional Statement.

Statement as to jurisdiction was filed. and probable jurisdiction was noted on October 13, 1941.

This is an action to enjoin and annul an order of the Interstate Commerce Commission, tried before a United States District Court of three judges. 28 U. S. C. A. 41

(28), 44, 47, 47a. It comes to the Supreme Court by direct appeal. 28 U. S. C. A. 345 (4). The District Court held it had jurisdiction, held that plaintiffs (appellants here) were proper parties to maintain the action, granted a part, and denied the remainder, of the relief asked by appellants (R. 29-37). This appeal is from the part of the final decree denying relief (R. 37, 42).

## Statement of the Case.

Appellants, seventy-one railroads, sued appellees to enjoin and annul an order of the Commission made under the so-called "grandfather" clause of Section 206 (a) of the Motor Carrier Act, 1935, now 206 (a) of Part II of the Interstate Commerce Act, 49 U. S. C. A. 306 (a).[1] This order had its origin in the following circumstances.

Appellee John P. Fleming, doing business as John P. Fleming Driveaway Service, filed application (R. 46) with the Interstate Commerce Commission on February 12, 1936, for authority under the "grandfather" clause to continue operation as a common carrier by motor vehicle in driveaway service of automobiles, trucks, chassis, unfinished automobiles, and all other automotive vehicles, between points in various states over irregular routes. The relevant part of Section 206 (a) is the following:

> "Sec. 206 (a). (Except as otherwise provided in this section and in section 210a,)[2] no common carrier

1. After this action was begun the Transportation Act of (September 18) 1940 became effective. 54 Stat. 899. This Act amended some of the sections of the Motor Carrier Act, 1935 (49 U. S. C. A. 301-327), and of Part I of the Interstate Commerce Act (49 U. S. C. A. 1-27), and created a new Part III of the Interstate Commerce Act to regulate water carriers (54 Stat. 929, 49 U. S. C. A. 901-923). This new legislation made some changes in wording and section numbering in some of the provisions applicable to this case, which will be noticed in the course of the argument. The Motor Carrier Act, 1935, was originally also denominated "Part II" of the Interstate Commerce Act (see 49 Stat. 543), but by the Act of 1940 the appellation "Motor Carrier Act, 1935" was amended out and this Act is now designated only Part II of the Interstate Commerce Act. 54 Stat. 919. In this brief both the old and the new terminology and numbering will be referred to as proper understanding may require.

2. Added June 29, 1938. 52 Stat. 1238.

by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time,* or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation (and has so operated since that time),[3] except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, *the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation,* and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful." (Emphasis supplied.)

Hearing on the application was held before an examiner on July 23, 1936. All of the appellants except four[4] ap-

3. Added September 18, 1940. 54 Stat. 923.

4. The four which did not appear before the Commission are: Detroit, Toledo and Ironton Railroad Company; C. E. Denny and John A. Haddon, Trustees for Erie Railroad Company; Chicago and Erie Railroad Company; and The Colorado and Southern Railroad Company.

peared as protestants (R. 4, 19, 24, 26, 62-67). The examiner's report and recommended order was filed September 10, 1937 (R. 68), and appellants filed exceptions to it (R. 78). The Commission, by Division 5, filed its report, 8 M. C. C. 469, and order, September 19, 1938 (R. 8). Thereafter appellants filed two successive petitions for reconsideration by the entire Commission of the report and order of Division 5, which were overruled, the last on March 6, 1939 (R. 79, 4, 19, 23, 26). Appellants commenced this action July 14, 1939 (R. 3). Trial was had on November 26, 1940, and final decree was entered April 7, 1941 (R. 36). This appeal was docketed in this Court May 29, 1941.

The authority granted appellee Fleming by the Commission is the following (R. 16):

> "We find that applicant was engaged, on June 1, 1935, and has been so engaged since that time, in bona fide operation as a common carrier by motor vehicle in driveaway service of new automotive vehicles, finished and unfinished, and new automotive vehicle chassis, in interstate or foreign commerce, from Detroit, Michigan, on the one hand, to all points in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, over irregular routes through the States of Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming; and that he is entitled to a certificate of public convenience and necessity authorizing the continuance of this operation * * *."

The District Court modified the Commission's report and order by excluding therefrom the right to transport property from Detroit to Arkansas (R. 36). In all other respects the Commission's report and order were sustained, and the Court adopted as its own "the findings of the Commission and its conclusions of law * * * except as modified" (R. 35).

One or more of the appellants are carrying, or participating in the carriage of, the commodities Fleming is authorized to carry, as common carriers of property in interstate commerce, from Detroit, Michigan, for delivery to all railroad stations and other points served by appellants in all of the states Fleming is authorized to serve, and have been so engaged for more than five years, and the amount of such traffic is substantial (R. 118, 43).

There is no conflict of evidence or dispute as to any facts. Appellants attack the Commission's order on two general grounds: (1) that the undisputed evidence is not sufficient to sustain it, and (2) that it is the result of and dependent upon erroneous construction of the applicable statutes. The specific errors in the action of the Commission and the decree of the District Court are stated in the assignment of errors, which is based upon the errors alleged in appellants' complaint in the District Court (R. 5) and the exceptions filed before the Commission (R. 78-82).

A certified copy of the entire record before the Commission was received in evidence in the District Court. This record is incorporated in the printed Record in this Court, except that part of the oral testimony is reduced to narrative form and some of the exhibits are condensed and rearranged for better understanding of the material parts, in accordance with Rules 8, #2, and 10, #2, of this Court. At the request of counsel for appellees we stipulated that the original record received in the District Court could be transmitted to this Court.

## Assignment of Errors.

For their assignment of errors plaintiffs, appellants, say the District Court erred in entering its opinion, findings, and judgment and decree in this action, in the following respects:

1.

In holding that there was sufficient evidence before the Interstate Commerce Commission to sustain its report and order, and its findings therein, that defendant, appellee, John P. Fleming, doing business as John P. Fleming Driveaway Service:

(a) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to all points in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, over irregular routes through the States of Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming:

(b) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to any point in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, other than the following: Birmingham, Alabama; Atlanta and Savannah, Georgia; Williamsburg, Kentucky; Asheville and Charlotte, North Carolina; Columbia and Hartsville, South Carolina; and Knoxville and Chattanooga, Tennessee.

2.

In holding that the Interstate Commerce Commission construed correctly the Motor Carrier Act, 1935 (now Part II of the Interstate Commerce Act) including the following phrase in Section 206 (a), 49 U. S. C. A. 306 (a):

> "* * * in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time * * *."

and in holding that the Commission correctly decided in its construction of said Act that appellee, John P. Fleming, doing business as John P. Fleming Driveaway Service:

(a) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to all points in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand:

(b) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to any point in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, other than the following: Birmingham, Alabama; Atlanta and Savannah, Georgia; Williamsburg, Kentucky; Asheville and Charlotte, North Carolina; Columbia and Hartsville, South Carolina; and Knoxville and Chattanooga, Tennessee.

3.

In sustaining the conclusion of the Interstate Commerce Commission that because (8 M. C. C. p. 472):

> "Briefly summarized, applicant, between January 1, 1934, and June 1, 1935, transported shipments of new automotive vehicles to one point in * * * Alabama;

> shipments to two points in each of the States of California * * * and Tennessee; shipments to three points in Washington, Oregon, Kentucky, and North Carolina; shipments to four points in Texas; shipments to five points in South Carolina, and to seven points in Georgia,"

the said defendant, appellee, John P. Fleming, was on June 1, 1935, in bona fide operation as a common carried by motor vehicle from Detroit, Michigan, to all points in said states.

4.

In sustaining the findings and conclusions of the Interstate Commerce Commission that transportation by the said defendant, appellee, John P. Fleming, of the few automotive vehicles shown by the evidence to have been transported by him on a few occasions to a few points in Washington, Oregon, California, and Texas, constituted bona fide operation as a common carrier by motor vehicle either on or after June 1, 1935, to any points in said states.

5.

In failing to hold that the evidence before the Interstate Commerce Commission showed that said defendant, appellee, John P. Fleming, was operating only as a contract carrier by motor vehicle on June 1, 1935, in Oregon, and has so operated there since that time, and therefore was not then and there operating as a common carrier by motor vehicle.

6.

In failing to hold that the evidence before the Interstate Commerce Commission showed that said defendant, appellee, John P. Fleming, was not in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and since that time, in, or upon the highways of Oregon, Ne-

braska, Missouri, Texas, and Ohio, because he was during such time operating upon the public highways of such states in violation of their laws regulating and taxing the operations of motor vehicles upon such highways.

7.

In failing to hold that if said appellee, Fleming, was in operation on June 1, 1935, and since that time, in any territory within which is included, either as the whole or a part thereof, Oregon, Texas, Nebraska, Missouri, or Ohio, said appellee was not in bona fide operation within said territory because he was operating in violation of the laws of said states.

8.

In adopting as its own, except to the extent modified in the opinion and decree, the findings of fact of the Interstate Commerce Commission.

9.

In adopting as its own, except to the extent modified in the opinion and decree, the conclusions of law of the Interstate Commerce Commission.

10.

Insofar as it held that the question, whether violation of state laws by a motor carrier constitutes lack of bona fide operation, is a question of fact for the determination of the Interstate Commerce Commission.

11.

In holding, either as a finding of fact or as a conclusion of law, or both, that any violations of state laws by appellee Fleming was temporary, inadvertent, or technical; and in failing to hold that such violations were intentional.

12.

In finding that four of the plaintiffs were interveners and protestants before the Interstate Commerce Commission, whereas the undisputed evidence shows that *all except four* of the plaintiffs were interveners and protestants before the Commission. (It is believed that the Court's statement and finding here excepted to is an inadvertence.)

## SUMMARY OF ARGUMENT.

1.

Appellants are parties in interest within Sec. 205 (g) of Part II of the Interstate Commerce Act, 49 U. S. C. A. 305 (g), and as such are proper parties to maintain this action.

2.

The evidence, all undisputed, is insufficient to support the Commission's conclusion that Fleming is entitled to the "grandfather" rights authorized, and in reaching its conclusions the Commission erroneously construed the applicable law. The Commission erred (a) in authorizing Fleming to operate to any point in the western states, and (b) in authorizing him to operate to all points in any of the states.

(A) Summary of this division.

(B) The Commission erred in finding that Fleming established "grandfather" rights to any point in Washington, Oregon, and California.

(C) The Commission erred in finding that Fleming established "grandfather" rights to all points in Washington, Oregon, and California, by his operations to those states.

(D) No special exceptions from the general rule of the "grandfather" clause should be permitted with respect to driveaway operations.

(E) "Territory" does not mean state.

(F) The phrase in Section 206 (a), 49 U. S. C. A. 306 (a), "within the territory for which application is made" does not mean "anywhere-for-hire."

(G) Summary of evidence with respect to other states: Arkansas, Texas, Tennessee, Kentucky, Alabama, Georgia, North Carolina, South Carolina.

3.

Appellee Fleming was operating in certain territory in intentional violation of law before and after June 1, 1935, and the Commission therefore erred in holding that he was in bona fide operation in that territory.

(A) Fleming held a contract carrier permit issued by the State of Oregon and was a contract carrier there and not a common carrier during the "grandfather" period.

(B) While operating motor vehicles through Nebraska appellee Fleming claimed that the vehicles were his own in order to escape payment of license fees.

# ARGUMENT.

## 1.

APPELLANTS ARE PARTIES IN INTEREST WITHIN SEC. 205 (G) OF PART II OF THE INTERSTATE COMMERCE ACT, 49 U. S. C. A. 305 (G), AND AS SUCH ARE PROPER PARTIES TO MAINTAIN THIS ACTION.

In the District Court appellees urged that appellants were not proper parties to maintain this action. The Court held appellants were entitled to sue. As appellees have brought this question before the Court by cross-appeal, it may be appropriate to cover it at the outset of our case.

At the time of its enactment the Motor Carrier Act, 1935, was denominated "Part II" of the Interstate Commerce Act, and the original Act was named "Part I." 49 Stat. 543. By the Transportation Act of (September 18) 1940, the name "Motor Carrier Act" was dropped and this Act as amended remains "Part II of the Interstate Commerce Act." 54 Stat. 919. The sections of both Part I and Part II which we are about to cite were not amended by the Act of 1940 except for renumbering and relettering.

The order of the Commission which appellants attack was made under Section 206 (a) of the Motor Carrier Act, 1935, formerly and now Part II of the Interstate Commerce Act. Section 205 (h) of the Motor Carrier Act, 1935 (now 205 (g) of Part II), provides in part 49 Stat. 550, 54 Stat. 922; 49 U. S. C. A. 305 (g)):

> "Any final order made under this part shall be subject to the same right of relief in court by *any party in interest* as is now provided in respect to orders of the Commission under Part I * * *." (Emphasis supplied.)

It is our position that we are within the description, "*any party in interest*," and that as such we are entitled to maintain this action. We look to "Part I" of the Interstate Commerce Act, and decisions of this Court construing it, to ascertain "the same right of relief in court—as is now provided in respect to orders of the Commission under Part I."

Under the decisions of this Court prior to the enactment (in 1935) of Section 205 (g), a competing carrier had a very broad and comprehensive right to sue to set aside an order of the Commission, made under Part I of the Interstate Commerce Act, granting a certificate of convenience and necessity to a competitor. We believe that when Congress enacted Section 205 (g) it showed its intent to bring into Part II the same right that existed in this respect as to Part I; and the District Court agreed with us.

Paragraph (18) of Section 1 of the Interstate Commerce Act (49 U. S. C. A. 1 (18)) forbids any railroad to build or operate or engage in transportation over any line of railroad until the Interstate Commerce Commission shall have authorized it to do so. Paragraph (20) of the same section provides in part:

> "Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, *or any party in interest* • • •." (Emphasis supplied.)

In *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, it was held that the foregoing paragraph (20) authorized a carrier not operating a railroad and not subject to the Interstate Commerce Act to maintain an action in a district court of three judges to annul an

order of the Interstate Commerce Commission granting a certificate of public convenience and necessity to a railroad. The Court said (pp. 391-392):

> "The right of the appellant Ferry Company to institute and maintain this proceeding rests wholly upon the permission granted by paragraph 20, Sec. 1. '*Any party in interest*' may institute a suit to enjoin a proposed construction, *operation*, or abandonment of a carrier's line unless it has obtained a certificate of public convenience and necessity from the Interstate Commerce Commission. In the absence of such certificate the doing of any of these things is declared to be unlawful—a crime subject to punishment by fine and imprisonment. And the permission is to apply to the court for an order to arrest the unlawful undertaking. *The inhibition applies where there is no certificate in fact, or where the Commission lacked power to grant the outstanding one because of insufficient evidence or other reason. An invalid certificate would leave the situation as though none had issued. Chicago, Rock Island and Pacific Railway* v. *United States*, 274 U. S. 29." (Emphasis supplied.)

The foregoing case is specific authority that appellants are parties "in interest" to maintain this action. It is to be particularly noted that in the Interstate Commerce Act the identical phrase, "any party in interest," is used in section 1 (20) of Part I and section 205 (g) of Part II, 49 U. S. C. A. 1 (20), 305 (g). It seems obvious that the rights of a "party in interest" under 1 (20) are at least co-equal under 205 (g).

The construction by the courts of the meaning of "any party in interest" in paragraph (20) of Section 1 of the Interstate Commerce Act demonstrates that appellants are "parties in interest" within the meaning of Section 205 (g).

In *Claiborne-Annapolis Ferry Co.* v. *United States*, *supra*, (285 U. S. 382) the Court also said (p. 390):

> "Considering *Texas* v. *Eastern Texas R. Co.*, 258

> U. S. 204, *Colorado* v. *United States*, 271 U. S. 153, *Western Pacific California R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47, and *Transit Commission* v. *United States*, 284 U. S. 360, it must be held that appellant is a 'party in interest' within the meaning of the statute capable of instituting the present proceeding. The bill disclosed that the proposed and permitted action might directly and adversely affect its welfare by changing the transportation situation."

In *Western Pacific California Railroad Co.* v. *Southern Pacific Co.*, 284 U. S. 47, cited in the above passage, the carrier held to be a "party in interest" had a case not as strong as ours. Western Pacific applied to the Interstate Commerce Commission for authority to build a line of railroad approximately twenty-five miles long, and made surveys for the line. Thereafter Southern Pacific commenced the construction of a line into the same territory without applying to the Commission for authority. Western Pacific sued in Federal Court to enjoin Southern Pacific from continuing such construction. The Commission had not acted yet on Western Pacific's application to it for authority to build a line. Southern Pacific in its defense to this suit urged that Western Pacific was not a "party in interest" within the meaning of Section 1, paragraph (20) of the Interstate Commerce Act (49 U. S. C. A. 1 (20)).

This Court held that Western Pacific was a "party in interest" and could maintain the suit, saying (pp. 51-52):

> "If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See *Massa-*

*chusetts* v. *Mellon*, 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation. Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened. It alleged the beginning of an unlawful undertaking by a carrier which might prove deleterious to it as well as to the public interest in securing and maintaining proper railroad service without undue loss. It relied upon the procedure prescribed by the statute to secure an orderly hearing and proper determination of the matter. The disclosures of the bill were enough to show that the respondent's intended action might directly and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a 'party in interest' within intendment of the Act."

Before that passage the Court had said, in explaining the purpose of the statute (pp. 50-51):

"Paragraphs 18 to 22, *supra*, were considered here in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, and were declared to be part of the general plan by which Congress intended to promote development and maintenance of adequate railroad facilities. It was there said, p. 277: 'It (Congress) recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public, that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss.'"

It will be observed that plaintiff in that case was not as yet carrying any traffic, never had carried any traffic, from the territory into which it desired to build a line. It had applied for but had not received authority to construct the line. Yet it was held to be "a party in interest" within the meaning of the above set out statutory provisions and therefore to have authority to maintain the suit. And the object of the suit in that case was the same as in our instant case by virtue of the holding in *Claiborne-Annapolis Ferry Co. v. United States, supra*, that "an invalid certificate would leave the situation as though none had issued."

It will be noticed that in the above case the holding of the court is that, by virtue of paragraph (20) of Section 1 of the Interstate Commerce Act, it is not necessary for a plaintiff, in a case of this character, to have "some clear legal right for which it may seek protection under the rules commonly accepted by courts of equity." Rather, the court held that one who was only a prospective carrier, one who had no traffic in fact and had no legal right to build rails to go after traffic, was a "party in interest."

Appellants are competitors with Fleming for automobile traffic. Appellants alleged in their complaint in District Court (R. 4-5), and it was stipulated at the trial (R. 118, 43), that appellants are carrying or participating in the carriage of automobiles from Detroit to all of the states Fleming is authorized to serve. The Interstate Commerce Commission has frequently pointed to the fact that motor carriers are taking much traffic from the railroads and that keen competition exists between them.[5] The Commis-

5. 52d Annual Report of the Interstate Commerce Commission, Nov. 1, 1938, p. 17: "As above stated, we regard the extraordinary increase in transportation competition as a primary cause of railroad ills. Whether it realizes it or not, the country has in fact experienced a transportation revolution in a very short space of time. The automotive highway vehicle has been the principal factor in this revolution. In the carriage of persons, it is now by far the most important means of transportation, and in the carriage of property it is growing in importance every day."
54th Annual Report, Nov. 1, 1940, p. 27: "Motor carriers * * * are strong competitors of the railways."

sion is now engaged in an investigation of rates charged by railroads and motor carriers for the transportation of new automobiles, one part of which is "the relation, if any there should be, of rates and charges as between said respective forms of transportation."[6] There has been a steady decline in the number of automobiles shipped by rail over the past twelve years. In 1929 the railroads originated as freight 53 per cent of all of the new automobiles manufactured in the United States, while in 1939 this percentage had declined to 37.3.[7] The Commission has "in numerous proceedings * * * granted certificates authorizing the transportation of automobiles by the drive-

6. 54th Annual Report, Nov. 1, 1940, pp. 41-42:
"Concerning the lawfulness of the rates, charges, rules, regulations, and practices of common carriers by railroad, common carriers by motor vehicle, including the so-called haul-away, drive-away, and tow-bar methods, contract carriers by motor vehicle, including the so-called haul-away, drive-away, and tow-bar methods, and common carriers by water for the transportation in interstate or foreign commerce (insofar as such transportation is subject to the provisions of parts I and II of the Interstate Commerce Act) of new automobiles, set up (not including shipments by rail or water moving on less-than-carload rates), from and to all points in the continental United States, other than the territory of Alaska, with a view to determining and prescribing just and reasonable rates, charges, rules, regulations, and practices thereafter to be observed, including minimum rates and charges and the relation, if any there should be, of rates and charges as between the said respective forms of transportation, and making such further order, or orders, or taking such other action in the premises as may be warranted by the record."

7.

| Year | Number of Passenger Automobiles manufactured in the United States | Passenger automobile traffic originated on railroads in the United States | | Per cent Col. (3) of Col. (1) |
|---|---|---|---|---|
| | | Number of Carloads | Number of Automobiles | |
| | (1) | (2) | (3) | |
| 1929 | 4,362,215 | 617,129 | 2,314,234 | 53 |
| 1931 | 1,911,717 | 242,489 | 909,334 | 47.5 |
| 1933 | 1,533,566 | 169,107 | 634,151 | 41.3 |
| 1935 | 3,211,734 | 357,808 | 1,341,780 | 41.7 |
| 1937 | 3,847,800 | 429,266 | 1,609,748 | 41.8 |
| 1939 | 2,822,261 | 281,200 | 1,054,500 | 37.3 |

Col. (1): U. S. Census of Manufactures: 1931 Year Book, p. 1045; 1937 Year Book, part 1, p. 1206; 1939 Preliminary Report, November 13, 1940, Industry No. 1810.

Col. (2): I. C. C. Annual Commodity Statistics, 30100, 32100, 34100, 36100, 38100, and 40100.

Col. (3): Computed upon basis of 3.75 automobiles per loaded railroad car.

away method or by the truck-away method.'"[8] In view of all this it would be closing eyes to reality to say that appellants are not a "party in interest."

The fact that appellants are railroads and appellee Fleming a motor carrier does not make appellants any the less a "party in interest"; it does not prevent application of Section 205 (g) to them. This section is general in terms. It accords certain rights to "*any* party in interest," not to "any interested motor carrier." The very generality of the section itself and the generality of its reference to Part I brings a competing carrier within its scope, albeit a railroad. There is nothing in the section which would authorize limiting "any party in interest" to a motor carrier. Had Congress intended to confine the "right of relief in court" to the applicant for a certificate, or to the governmental agencies named in Section 1 (20), it would have done so. These agencies are not even named in Section 205 (g).

The Court recently gave attention to the construction of "any party in interest" in Section 1 (20) in *L. Singer & Sons* v. *Union Pacific Railroad Company*, 311 U. S. 295. There is nothing in that case contrary to our position and much that supports us. The Court's opinion states:

> "An individual may have some special and peculiar interest which may be directly and materially affected by alleged unlawful action. See *Detroit & M. R. Co.* v. *Boyne City, G. & A. R. Co.* (D. C.), 286 F. 540. If such circumstances are shown he may sue; he is then 'party in interest' within the meaning of the statute."

The *Boyne City* case, in which a railroad was held a "party in interest" to sue another railroad, supports our position, and was cited by the District Court (R. 31).

In the concurring opinion of Mr. Justice Frankfurter it is said (pp. 306-307):

> "Who then is a 'party in interest'? As a part of

8. *West Penn Forwarding Company Common Carrier Application*, 29 M. C. C. 201, 204.

the very system through which the national policy is to be achieved, a railroad has been deemed by this Court a 'party in interest' to effectuate the railroad policy introduced by the licensing system of the Transportation Act. *Texas & P. R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 277; *Western P. California R. Co.* v. *Southern P. Co.*, 284 U. S. 47. And one who in a proceeding initiated before the Interstate Commerce Commission has been treated by it as a party to the litigation, cf. Los Angeles Passenger Terminal Cases, 100 Inters. Com. Rep. (F.) 421, 142 Inters. Com. Rep. (F.) 489; *Atchison, T. & S. F. R. Co.* v. *Railroad Commission*, 283 U. S. 380, 393, 394, may perhaps be deemed a 'party in interest' in the further pursuit of claims before a court after adverse action by the Commission. Compare *Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co.*, 288 U. S. 14, and *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470."

In that and in the Court's opinion there is implicit recognition of the rule of *Claiborne-Annapolis Ferry Co.* v. *United States supra* (285 U. S. 382), that a competing carrier is a "party in interest." Besides that, sixty-seven of the appellants, all but four, were protestants before the Commission and were "treated by it as a party to the litigation."

The dissent written by the present Chief Justice recognizes, we think, that a competing carrier is "party in interest", by including within that phrase an affected shipper or receiver.

2.

THE EVIDENCE, ALL UNDISPUTED, IS INSUFFICIENT TO SUPPORT THE COMMISSION'S CONCLUSION THAT FLEMING IS ENTITLED TO THE "GRANDFATHER" RIGHTS AUTHORIZED, AND IN REACHING ITS CONCLUSIONS THE COMMISSION ERRONEOUSLY CONSTRUED THE APPLICABLE LAW. THE COMMISSION ERRED (a) IN AUTHORIZING FLEMING TO OPERATE TO ANY POINT IN THE WESTERN STATES, AND (b) IN AUTHORIZING HIM TO OPERATE TO ALL POINTS IN ANY OF THE STATES.

(A) SUMMARY OF THIS DIVISION.

We submit in this division that the undisputed evidence is insufficient to support the Commission's order, and that the order is the result of and dependent upon erroneous construction of the statutes. Our argument is in two subdivisions, stated alternatively. As each subdivision concerns the same evidence and to a large extent the same principles of law they are considered together.

The Commission authorized Fleming to serve from Detroit

> "* * * all points in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Texas, and Washington" (R. 16).

Summarizing the evidence upon which its order is based the Commission said (8 M. C. C. 469, 472; R. 12):

> "Briefly summarized, applicant, between January 1, 1934, and June 1, 1935, transported shipments of new automotive vehicles to one point in each of the States of Arkansas and Alabama; shipments to two points in each of the States of California, * * * and Tennessee; shipments to three points in Washington, Oregon, Kentucky, and North Carolina; shipments to four points in Texas; shipments to five points in South Carolina, and to seven points in Georgia.
>
> "As to the States other than California, * * * Arkansas, Texas, Oregon, and Washington, applicant transported numerous shipments to the points served."

There are serious defects in this finding and the conclusions which the Commission drew from it, in addition to those apparent on its face. From early in 1934 to July 23, 1936, the date of the hearing, there was only one shipment to some points, and not more than four shipments to any point, in all of the western and some of the eastern states. Such shipments consisted of from one to a few vehicles. Some points were served only before June 1, 1935, and others only after that date, so that in some large areas the number of points served both before and after June 1, 1935, is even less than the number stated in the Commission's above recited summary.

The Commission itself gave voice to doubt, saying (8 M. C. C. p. 472; R. 13):

> "It is clear that transportation of this scope prior to June 1, 1935, raises a difficult question as to whether applicant is entitled to authority to transport to all points in all of the States served."

We urge, first, that the Commission erred in holding that Fleming established "grandfather" rights to *any* point in those states, except for the qualification stated in our assignment of error 1 (b) (R. 38). Second. If we are mistaken in our first contention, then we say that the Commission erred in holding that the service shown to have been made to one or a few points in a state established "grandfather" rights to serve *all* points in the state.

The Commission considered the evidence state by state. We will group various states together, first taking up Washington, Oregon, and California, and in discussing these three will present our general argument. The evidence respecting the other states will thereafter be stated without further argument.

(B) THE COMMISSION ERRED IN FINDING THAT FLEMING ESTABLISHED "GRANDFATHER" RIGHTS TO ANY POINT IN WASHINGTON, OREGON, AND CALIFORNIA.

Fleming's application is under the "grandfather" clause of Section 206 (a) of the Motor Carrier Act, 1935 (49 U. S. C. A. 306 (a)), now Part II of the Interstate Commerce Act; so the purpose of the evidence submitted at the hearing, and our purpose in examining the evidence now, is to ascertain what Fleming was doing on June 1, 1935, and has been doing since that time. If he—

> "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time" (49 U. S. C. A. 306 (a)),

he was entitled to a certificate. If he was not so operating on June 1, 1935, or has not so operated since that time, then his application for "grandfather" rights must be denied, *United States* v. *Maher*, 307 U. S. 148. "Operation" means "actual rather than potential service." *McDonald* v. *Thompson*, 305 U. S. 263, 266.

For the purpose of this division of the argument the constructions of "common carrier" and "territory" are important. "Common carrier" was defined in Section 203 (a) (14) of the Motor Carrier Act, 1935, as follows (49 Stat. 544):

> "The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I."

This definition was amended by the Transportation Act of (September 18) 1940 to read (54 Stat. 920):

> "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I."

Section 208 (a) provides (49 U. S. C. A. 308 (a)):

> "Any certificate issued under Section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate * * *."

It is our position that the Commission erroneously construed "common carrier" and "territory," and that the evidence (all undisputed) was insufficient to show that Fleming was operating as a "common carrier" in the "territory" the Commission's order authorizes him to serve.

Attached to Fleming's application were shipping bills showing service to various points, to support his claim of service during the "grandfather" period, and these were received in evidence (R. 92). The application states that these bills were "picked at random" (R. 56). During the hearing it was agreed by counsel for all parties and by the examiner that Fleming should produce a list of consignees served by him in the various states and the dates he began to serve them and file it with the Commission within ten days (R. 104-105). This list was filed August 16, 1936, and will be referred to as the supplemental

list (R. 109). The shipping bills and this list are identified in the Commission's report, and constitute the evidence as to service upon which the Commission's order was based.

We have tabulated below the evidence as to deliveries to consignees in Washington, Oregon, and California, as revealed by the shipping bills and the supplemental list (R. 93, 94, 96, 110, 114, 118). After each date is shown the number of cars delivered on that date (*e. g.*, at Yakima, Washington, the shipping bills show that on April 3, 1935, there were 7 cars delivered).

| States | Before June 1, 1935 | | After June 1, 1935 | |
|---|---|---|---|---|
| | Shipping bills | Supplemental list | Shipping bills | Supplemental list |
| Washington | | | | |
| Yakima | Apr. 3, '35: 7 | Feb. 28, '35: 10 | | |
| Seattle | Apr. 3, '35: 2 | | Dec. 11, '35: 1 | Feb. 14, '36: 6 |
| Vancouver | Apr. 26, '35: 4 | May 9, 1935: 4 | | |
| Oregon | | | | |
| Eugene | | Apr. 12, '35: 4 | | |
| Klamath Falls | Apr. 12, '35: 4 | | | |
| Portland | Apr. 23, '35: 5<br>May 13, '35: 11 | | July 19, '35: 13<br>Oct. 28, '35: 13 | |
| California | | | | |
| San Jose | Aug. 14, '34: 1 | | | |
| Los Angeles | May 22, '35: 2 | | | |
| San Francisco | | | Dec. 11, '35: 2 | |

The table enables the Court to see at a glance the service Fleming was rendering to each of these states and to the entire Pacific coast during the "grandfather" period.

Fleming testified orally respecting his operations to these three states as follows:

*Washington.*

With respect to Washington, Fleming testified that on June 1, 1935, he was engaged in performing service and making deliveries into Seattle, Vancouver, and Aberdeen. He stated that he had made only two trips to Spokane and that such trips were made subsequent to June, 1935; he did not state when these trips were made and no record of them appears either in the shipping bills or supplemental list. When he first started his operations were chiefly in the south and southeast of the United States and his service into western territory is more or less recent (R. 99).

*Oregon.*

In Oregon I made deliveries in 1935 at Portland, Klamath Falls, and Salem. With my application for a contract carrier permit to operate in Oregon I filed a copy of my written contract with the Cohen-Anderson Motor Co., and I filed no other contract. On June 1, 1935, I was making deliveries at Salem, Oregon, to the Hudson dealer there. I have not made deliveries to Salem since June 1, 1935. For a time I was making deliveries at Klamath Falls, Oregon, but I am not making deliveries there now. At the present time I have no other consignee in Oregon than the Cohen-Anderson Motor Co. at Portland. We made a few deliveries of automobiles to the Karakeen Motor Co. at Portland subsequent to June 1, 1935. I do not remember the date. I made no report of that to the Public Utilities Commission of Oregon. My arrangement is all through Cohen-Anderson for the delivery of Hudsons and Terraplanes and it was prior to June 1, 1935, although according to directions I made a delivery to Klamath Falls or Salem (R. 99, 101).

*California.*

I commenced operations this year (1936) with James F. Waters Corporatior of San Francisco, dealer in De Soto cars.

Others we have delivered for in California are Earl

C. Anthony and the Hudson Car Company. Earl C. Anthony was the Hudson Terraplane dealer in Los Angeles. He is now handling another make of car and we are not delivering to him now. We ceased doing business with him in the spring of 1936. We started doing business with him in 1935, I am not sure whether it was prior to June 1 or just after, but it was in the summer of 1935. I know that we made a few deliveries for Earl C. Anthony in the summer of 1935, but I am not certain as to the date; I think we made about three deliveries, a small number of cars. It was more or less temporary, or a substitute arrangement. Anthony caravans most of his own cars and we helped out when he was not in shape to handle some of his own stuff.

In 1934 we had three shipments, and some in 1935, for the Brown Boyd Motor Company of Bakersfield, California, dealers in Hudson and Terraplane. We are not still doing business with them; that was an occasional shipment, it was not a regular continuous business. Since that time that company has conveyed its own vehicles.

Our most recent delivery in California has been for General Motors taxicabs, dealer cabs, last week (prior to July 23, 1936, the date of the hearing). I delivered some GMC trucks in California in February, 1936, but none prior to that time. In June of 1935, I was not engaged in the business of serving General Motors in the shipment of vehicles to California (R. 101-102).

It will be observed that this oral testimony is all general, vague, and inconclusive. It adds nothing to the evidence furnished by the shipping bills and the supplemental list. This is true, among other reasons, because of the circumstances surrounding the supplemental list itself. By agreement this list was to show the consignees served and the dates Fleming began to serve them (R. 104-105). The hearing ended on July 23 (R. 83) and the list was filed with the Commission on August 16. He had ample time to prepare this evidence. In view of all this, the failure of this list to show service is important. It is material to contrast

he meager showing as to the Pacific coast states with the arge number of deliveries shown in the southeastern states (R. 92-95, 109-118).

It is submitted that the foregoing evidence was utterly nsufficient to establish that Fleming was, on June 1, 1935, operating as a common carrier to any point in Washington, Oregon, and California, and "has so operated since that time," within the meaning of Sections 206 (a), 203 (a)(14), and 208 (a). "Since that time" comprises from June 1, 1935, to July 23, 1936, the date of the hearing. *United States* v. *Maher*, *supra* (307 U. S. 148).

Fleming was never employed as a carrier by any person in Detroit, but only by dealers to whom he transported cars (R. 100). To have been a common carrier during the "grandfather" period he must have been carrying for the *general public*, under Section 206 (a). The few deliveries he made to the Pacific coast cities plainly did not constitute serving the general public of those cities. *McDonald* v. *Thompson*, *supra* (305 U. S. 263), and *United States* v. *Maher*, *supra*, establish rules of importance here. In the *McDonald* case the Court said:

> "The expression 'in bona fide operation' suggests absence of evasion, *excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential service* • • •."

In the *Maher* case the applicant was engaged in irregular route operations prior to June 1, 1935, but after that date he discontinued them and instituted a regular route operation. The Court said:

> "Since the new regular route of appellee was not in existence on June 1, 1935, and the irregular 'anywhere-for-hire' service was not 'so operated,' as required by Sec. 206, when the Commission passed upon the application for a 'grandfather' certificate, the Commission rightly rejected the application."

What that case principally stands for, as we understand it, is that the period after June 1, 1935, is just as important as that before.

From August 14, 1934, to July 23, 1936, two years, Fleming made trips to nine cities in the three Pacific Coast states. However, only two of the cities served before June 1, 1935, were served after that date. These two were Seattle, Washington, and Portland, Oregon. In California the only city served after June 1, 1935, was San Francisco, but he had not made any trips there before June 1, 1935. As to the cities not served after June 1, 1935, he had not "so operated since that time" (49 U. S. C. A. 306 (a)) so had failed to preserve any possible inchoate rights to such cities that might have originated through service to them on or before June 1, 1935.

Referring now to the only two cities in the three states served both before and after June 1, 1935, the last trip to Seattle was February 14, 1936, five months before the hearing, and the last to Portland was October 28, 1935, nine months before the hearing. It cannot be said that Fleming was in *actual operation* as a common carrier transporting property for the general public to those cities, in the face of those five and nine months' lapses in service.

Seattle has 368,302 population and Portland 305,394. Large numbers of motor vehicles are sold in cities of this size, and there are numerous automobile dealers. If the "general public" is considered the dealers it is obvious that the service rendered by Fleming, whether before or after June 1, 1935, was not an actual, continuing, common carrier service to even one member of that general public. If Fleming's service is sufficient to qualify him for "grandfather" rights, then the number of carriers who can so qualify is almost unlimited.

The "grandfather" clause was meant to allow continuance of operations already serving the public convenience

and necessity. If everyone who has brought a few vehicles into the state is granted a certificate that purpose is defeated and a flood of carriers is loosed far in excess of what is required to meet public convenience and necessity. This results in destroying the fundamental purpose of the Act, regulation in the public interest. Instead of regulation which holds the volume of carriers to the number actually serving public convenience and necessity, there is substituted the rule of indefinite multiplication. Thus the exception, the "grandfather" clause, is permitted to overcome the chief aim of the Act. That these observations are sound is attested by a consideration of authorities including decisions of the Commission itself.

In dealing with these questions it is evident that two considerations are uppermost. The first is the fundamental purpose of the Act. The second is the maintenance of the proper relation between that underlying purpose and the "grandfather" clause. This Court has already pointed the way, saying in *McDonald* v. *Thompson, supra* (305 U. S. 263, 266):

> "As the Act is remedial and to be construed liberally, the proviso defining exceptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms. *Piedmont & N. R. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311."

This principle was applied with care in *United States* v. *Maher, supra* (307 U. S. 148).

In cases construing the certificate provisions of Part I of the Interstate Commerce Act, 49 U. S. C. A. 1 (18) to 1 (22), the Court has uniformly ruled that the construction and operation excepted from certificate requirements must be rigidly held within close limits lest a loosening of restrictions result in construction and operation that actually should be determined upon the basis of public convenience and necessity. As the Court said in *Piedmont &*

*Northern Railway Co.* v. *Interstate Commerce Commissi*
286 U. S. 299, 311:

> "In *Texas & P. R. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277-278, the court announced the guiding principles to be followed in construing the very paragraph involved in the case at bar. As there indicated, the purpose of the statute to develop and maintain an adequate railway system for the people of the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress. Accordingly, a track seven miles in length, proposed to be constructed to reach industries in territory not theretofore served by the railroad, and which would take away from a competitor much of the traffic then enjoyed, was held not to be an 'industrial track,' as that phrase is used in paragraph (22), although by strict construction it was such.
>
> "* * * The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

The "most important" objective of the Motor Carrier Act was described as follows by Chairman Eastman of the Interstate Commerce Commission before the Senate Committee on Interstate Commerce when S. 1629, the Motor Carrier Act, was under consideration. Mr. Eastman was then a member of the Commission and Coordinator of Transportation. He said, referring to S. 1629 and S. 1632, the Water Carrier Act (Hearings before Senate Committee on Interstate Commerce on S. 1629, 74th Congress, 1st Sess., p. 78):

> "I was going on at this moment to mention some of the important objectives which these bills seek to accomplish and which relate to both of the bills.
>
> "The most important thing, I think, is the prevention of an over-supply of transportation; in other words, an over-supply which will sap and weaken the

transportation system rather than strengthen it. In the case of railroads that was done in 1920 by the provision that prior to any new construction a certificate of convenience and necessity must be secured from the Commission. In my judgment it would have been much better if there had been such a provision many years before. It would have prevented certain railroad construction which tends to weaken the railroad system and situation at the present time. The States have, I think, in all cases, found the necessity in their regulation of motor transportation to provide for that prevention of an oversupply. It is a provision which has been adopted in most of the foreign countries that I have inquired into; in other words, the granting of certificates or permits in order to prevent an oversupply which weakens the situation."

A concise statement combining the principles of the above recited views of the Court and Mr. Eastman was made by the Commission in *Carolina Freight Carriers Corporation Common Carrier Application*, 24 M. C. C. 305, 308:[9]

"Furthermore, we have frequently stated that authority to transport general commodities throughout a wide territory, over irregular and unspecified routes, pursuant to the 'grandfather' clauses of the act, should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. *To do otherwise would create the very ills which regulation is designed to alleviate, namely, congestion of highways, destructive rate practices, and unbridled competition.*" (Emphasis supplied.)

In *Loving* v. *United States*, 32 F. Supp. 464 (affirmed by memorandum opinion, 310 U. S. 609), a District Court said:

"*Too, we can imagine possible defeat of the purpose intended to be achieved by enactment of the particular*

9. The Commission's order was annulled by a District Court in a suit brought by the applicant, 38 F. Supp. 549. The Commission appealed to this Court and probable jurisdiction was noted October 13, 1941, *United States* v. *Carolina Freight Carriers Corporation*, Term No. 197.

> *Congressional Act, by granting, under the 'grandfather' clause, of numerous permits where there have been mere offers to perform service without in fact actual performance thereof.*" (Emphasis supplied.)

In *Eastern Carrier Corporation* v. *United States*, 31 F. Supp. 232, the court sustained the order of the Commission in *Eastern Carrier Corporation Common Carrier Application*, 14 M. C. C. 430, granting part and denying part of the authority applied for under the "grandfather" clause. The Commission had said (p. 434):

> "The evidence shows that applicant and its predecessor have transported other commodities and served other points but such operations have been more or less sporadic and not continuous since June 1, 1935."

The District Court said:

> "Considering the tabulation of waybills as evidence, we would conclude, as did the Commission upon all the evidence before it, that the transportation of general merchandise by the plaintiff was sporadic and entirely incidental to its chief business, which was that of transporting silk, rayon, hosiery, and commodities for mills processing or manufacturing such commodities."

In the Commission decisions referred to above there had been proof by applicants of sporadic service, like Fleming's, and the Commission held it insufficient to establish "grandfather" rights. The Commission has attempted to distinguish that line of cases from the present one on the ground that those applicants were transporting "general commodities." In subdivision (D) hereof we will consider the Commission's theory. We think the "general commodities" rule should apply even more strictly in the case of automobile driveaway operations.

The next subdivision of the argument is in many respects a continuation of this one. While some of the argument and

authorities cited in the next division may not apply closely to this one, everything said in this division is altogether applicable to the next one.

(C) THE COMMISSION ERRED IN FINDING THAT FLEMING ESTABLISHED "GRANDFATHER" RIGHTS TO ALL POINTS IN WASHINGTON, OREGON, AND CALIFORNIA, BY HIS OPERATIONS TO THOSE STATES.

Assuming now, for the purpose of argument, that the Commission correctly held that Fleming established "grandfather" rights to Seattle and Portland, the only two cities served both before and after June 1, 1935, nevertheless, the Commission erred in holding that service to these two cities established "grandfather" rights to all points in Washington, Oregon, and California. (While in the next paragraph we refer to San Francisco, we do not include it in this assumption because the first and last service to it was December 11, 1935).

If there had not been the service to Seattle, Portland, and San Francisco, after June 1, 1935, we presume that it would not be held by anyone that Fleming had established "grandfather" rights to the "territory" embraced in those three states. *United States* v. *Maher, supra* (307 U. S. 148). Therefore it appears that the operations to these three cities after June 1, 1935, constituted the basis for the Commission's holding that Fleming was from June 1, 1935, to July 23, 1936, in actual operation as a common carrier transporting property for the general public of Washington, Oregon, and California. These operations consisted of trips to Seattle on December 11, 1935 (one vehicle), and on February 14, 1936 (6 vehicles); to Portland on July 19, and October 28, 1935 (13 vehicles each time); and to San Francisco on December 11, 1935 (2 vehicles).

This requires a consideration of what the "territory" in question and the "general public" within it consists.

Facts of common knowledge show that both are of colossal proportions in comparison with Fleming's service within and to them. With respect to "territory" and "general public" so huge, practically an unlimited number of carriers could have rendered the service Fleming gave, resulting in multiplication without end of the carriers with "grandfather" rights. This utterly defeats the purpose of the Act and of the "grandfather" clause.

There are important cities in the three states not served by Fleming during the "grandfather" period which cannot by any proper construction of the word be said to lie within the "territory" of Seattle, Portland, or San Francisco. In Washington there is Spokane, population 122,001, and 210 miles east of Seattle. Walla Walla, population 18,109, is 200 miles southeast of Seattle and 180 miles southwest of Spokane. Bellingham, population 29,314, is 80 miles north, and Tacoma, population 109,408, is 35 miles south of Seattle. Olympia, the capital, population 13,254, is 50 miles southwest of Seattle. Wenatchee, population 11,620, is 80 miles east of Seattle and 140 west of Spokane.

The population of Los Angeles is 1,504,277. San Francisco has 634,536, and five miles across the bay are Oakland with 302,163, and other adjacent cities. Here are two metropolitan areas 470 miles apart, each with population greatly exceeding a million. Yet the Commission held that they are in the same "territory" and that delivery of two vehicles to one in May, 1935, and two vehicles to the other in December, 1935, gave Fleming "grandfather" rights to the whole state.

Portland is in the northwest corner of Oregon, over one hundred eighty miles from Pendleton, 8847 population, La Grande, 7747, and Baker, 9342, in the northeast part of the state; and the same distance from Medford, 11,281, Ashland, 4744, Grants Pass, 6028, Roseburg, 4924, and Marshfield 5259, in the southwest corner.

Several hundred thousand new passenger and commercial cars were sold by automobile dealers in the three states in 1935 and in 1936, and the smallest number sold in any state in either year exceeded 31,000.[10]

That a large volume of motor vehicles is transported to the coast states by the driveaway method for purpose of sale may be judicially known to the Court.[11]

If every driveaway operator who transported seven vehicles in two trips to any city in Washington, during 14 months after June 1, 1935, with meager service like Fleming's before that date, is to have "grandfather" rights to the entire State of Washington, then there is no limit to the number of carriers who have such rights. Instead of limiting "grandfather" authority to actual service and

10. MOTOR VEHICLE REGISTRATIONS.

| | 1940 | 1939 | 1938 | 1937 | 1936 | 1935 |
|---|---|---|---|---|---|---|
| *Washington*— | | | | | | |
| New passenger car registrations | 46,497 | 33,316 | 23,935 | 49,699 | 54,458 | 36,685 |
| New commercial car registrations | 9,306 | 7,149 | 5,416 | 10,222 | 10,666 | 9,076 |
| *Oregon*— | | | | | | |
| New passenger car registrations | 34,358 | 25,574 | 18,769 | 35,915 | 40,460 | 25,749 |
| New commercial car registrations | 7,212 | 5,873 | 4,064 | 7,859 | 8,050 | 5,964 |
| *California*— | | | | | | |
| New passenger car registrations | 250,894 | 187,720 | 148,011 | 246,075 | 256,255 | 196,967 |
| New commercial car registrations | 32,397 | 25,656 | 23,846 | 36,901 | 33,656 | 28,943 |
| Grand Totals | 380,664 | 285,288 | 224,041 | 386,671 | 403,545 | 303,384 |

Source: Automotive News, 1941 Almanac Issue, Detroit, July 14, 1941, pp. 54, 110.

11. 15,000 cars per year to California in 1935 and 1936: *Ingels* v. *Morf*, 300 U. S. 290, 296; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 599.

See *Wallace* v. *Pfost*, 57 Idaho 279, 65 P. (2d) 725, 110 A. L. R. 613; *Morf* v. *Bingaman*, 298 U. S. 407; and annotation 110 A. L. R. 622.

Chapter 184, p. 716, Session Laws of Washington, 1937, § 6382-60-73, Remington's Rev. Stat., which regulates and taxes driveaway operations, recites in Section 1:

"The unregulated commercial use of the highways of this state in the caravaning of motor vehicles from other states intended for sale or exchange, most of which vehicles are unlicensed in this state, has contributed to the congestion of such highways, and increased the dangers of driving thereon, and has resulted in deplorable working conditions for employees operating such caravans. This act is remedial and for the purpose of ameliorating such conditions."

actual territory served, any one who has ever set foot in one point in the state has "grandfather" rights to the entire state.

In California about 15,000 vehicles were terminated annually by driveaway in 1935 and 1936.[12] Delivery of five vehicles in two years satisfied the Commission that Fleming was in *actual* operation as a common carrier serving the general public of that state. This produces the fraction 1/6000.

In *Howard Hall Co., Inc.* v. *United States*, 38 F. Supp. 556, the Court sustained the Commission's order in *Howard Hall Co., Inc., Common Carrier Application*, 24 M. C. C. 273, saying:

> "It (the Commission) found that the applicant had not served 'enough representative points in all the states claimed with a sufficient degree of regularity to be entitled to authority to transport general commodities to and from all points within such a large territory as described in the amended application.'"
>
> • • • • •
>
> "The petitioner's second contention is that there was evidence and a finding that there had been 55 movements of freight to and from an area within 100 miles of Birmingham prior to June 1, 1935, and 270 movements in the area thereafter, and that the Commission, therefore, erred as a matter of law in limiting operations 'between Birmingham, Alabama, and all points within 10 miles thereof,' and that the area should have been 'within 100 miles of Birmingham.' As to movements of freight in the 100 mile area the Commission found that of 1,000 shipments transported prior to June 1, 1935, 875 moved to or from Birmingham, and that only 55 moved from points within 100 miles of Birmingham, and that only '12 points were served in the comparatively large territory surrounding applicant's headquarters in Birmingham. Of 2,550 shipments transported after June 1, 1935, only 270 moved to or from 100 miles of Birmingham. The

12. See footnote No. 11.

> evidence of shipments within the 100 mile area claimed by the petitioner did not show substantial, *bona fide* operations of sufficient regularity to require the issuance of a certificate under the 'grandfather clause' authorizing free lance operation in this large territory. In limiting the applicant's operations to and from Birmingham to a ten mile zone beyond the city limits of Birmingham the Commission acted within its authority and not capriciously or arbitrarily."

There is an illustrative parallel between that case and the present one. Fleming conducted to points in certain southeastern states regular and frequent operations which, admittedly, were sufficient to establish "grandfather" rights. Just as in the *Howard Hall* case, *supra*, these operations are to be contrasted with those insufficient to fix "grandfather" rights. The service rendered by Fleming to the southeastern points shows what he actually could do when there was actual public convenience and necessity to be served, that is, when there were actual common carrier operations to be conducted for the general public. Considering together this record and the history of his operations to the western states shows that though he had the *ability* to serve the west there was no sufficient demand for his services to cause him to carry on actual common carrier service to the general public there. Since he did not conduct such a service to the west he was not entitled to "grandfather" rights there.

(D) NO SPECIAL EXCEPTIONS FROM THE GENERAL RULE OF THE "GRANDFATHER" CLAUSE SHOULD BE PERMITTED WITH RESPECT TO DRIVEWAY OPERATIONS.

We understand the Commission to say in its Report (R. 14) that due to the "highly specialized" nature of the transportation service rendered by Fleming there should be some relaxation for him of the general application of the "grandfather" clause. We submit that this view is

not sound. We have heretofore cited a few Commission decisions, which have come before district courts, with respect to "general commodities." We think the principles there exhibited should be applied even more strictly to driveaway operations, instead of being relaxed.

In the preceding subdivision we have pointed to the contrast between Fleming's operations to the west and those to the southeast. This indicates that the meager service to the west was not due to lack of capacity to serve, but rather lack of a demand sufficient to bring about actual common carrier operations for the general public.

It should be particularly noted that there is one feature that distinguishes driveaway service from all other motor carrier operations: it requires no motor vehicle equipment; the equipment requirements are far less than for any other motor carriage; substantially all that is required is to "driveaway."[13] The service that a driveaway carrier may render is therefore not subject to the usual restrictions imposed by limitations of equipment. A hauler of general commodities, or any other motor carrier, must possess expensive motor truck equipment, and his ability to serve is measured by that equipment. The chief factor in the scope of his operations is the extent of his equipment. So when he does serve points he manifests (1) the demand for his services and (2) that he has equipment sufficient to meet these demands. On the other hand, the only restriction on the scope of driveaway operations is the demand therefor.

It follows that an ordinary motor carrier is not likely to be found rendering sporadic service outside of the territorial limitations of traffic density, whereas considerations of equipment and traffic density have much less, if any, effect upon driveaway operations. The incentive to serve a territory, that is, the traffic to be obtained, must be much

13. For Commission safety regulations see Motor Carrier Safety Regulations, Revised. Jan. 1, 1940. Rule 3.5.

greater where it is necessary to operate a truck to carry the freight, than where all that is required is to drive vehicles to the place where they are wanted.

Therefore driveaway operations should be scrutinized more rigorously than any other in determining whether a carrier was in actual operation serving the general public. The only limitation on his ability to serve is the public demand for his services, and if the service has been as meager as that of Fleming in the west it is evident that he was not serving the general public, that there was no demand for his services that could in any remote degree be called a demand by the general public.

A carrier whose actual operations are so sensitive to demand and so foot-loose and free from limitations of equipment should be required to prove public convenience and necessity unless his "grandfather" rights are clearly established.

### (E) "TERRITORY" DOES NOT MEAN STATE.

The Commission construed the words "within the territory" to mean that if a carrier is operating to one point in a state the "territory" he is serving is the whole state. Substantially the Commission has construed that the word "territory" means state.

This construction is erroneous. The word "state" is used a number of times in the Interstate Commerce Act to denote the several states of the Union. Thus it appears in Sections 202 (b), 203 (a), 203 (b), 205 (b), 205 (c), 206 (a), and 222 (f). The word "territory" is used in Sections 206 (a), 208 (a), and 209 (a). There is assuredly no warrant for construing "territory" to mean the same as "state". The two words are used to express different meanings, and plainly are not interchangeable.

Congress might have written Section 206 (a) to read

"over the route or routes or *within the states* for which application is made". And Congress' use of the word "territory" instead of "state" raises something more than the ordinary presumptions as to legislative choice; it is affirmatively evident from other provisions of the Act that Congress used the word "territory" to mean something else than "state". Thus Section 205, pars. (b) and (c), authorize the creation of "joint boards" of state officials to consider operations which involve "not more than three states". Section 206 (a) provides certain exemptions from the terms of the Act as to persons carrying on interstate commerce but "engaged in operation solely within any state." In those sections Congress made use of the word "state" to describe operations within certain geographical areas. So when it used the word "territory" in Section 206 (a) it meant something else than "state".

(F) THE PHRASE IN SECTION 206 (A), 49 U. S. C. A. 306 (A), "WITHIN THE TERRITORY FOR WHICH APPLICATION IS MADE", DOES NOT MEAN "ANYWHERE-FOR-HIRE".

The Commission's construction of Section 206 (a) has given that section substantially the same meaning as if the phrase "within the territory for which application is made" had been written "anywhere-for-hire". Such construction is contrary to the plain terms of the Act, and is forbidden by the legislative history of the Act. Early in the history of the movement which led to the enactment of the Motor Carrier Act the Commission and its personnel recommended that Congress classify motor common carriers of property as (a) those operating over a regular route or between fixed termini, and (b) *those operating anywhere for hire.* Congress did adopt classification (a) but did not adopt (b). Instead it adopted something very different, the classification made by Section 208 (a):

"SEC. 208. (a) Any certificate issued under sec-

> tion 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, the intermediate and off-route points, if any, at which, *and in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate;* * * *." (Emphasis supplied.)

There is a vast difference between a carrier authorized to operate "anywhere-for-hire," and one who is authorized to continue to operate in the territory where he actually has been operating. We shall now observe briefly the course of evolution from the idea of "anywhere-for-hire" to "the territory within which the motor carrier is authorized to operate." It offers light on the construction that should be given to "territory", and makes plain some of the Commission's errors in this case.

In 1926 the Commission on its own motion ordered an investigation of motor carrier transportation throughout the country. Attorney-examiner Flynn was assigned to it and conducted extensive hearings. 140 I. C. C. 685; 1926 Annual Report of I. C. C. 41. In 1928 the Commission issued its report based on these hearings in *"Re Motor Bus and Motor Truck operations,"* Docket No. 18300, 140 I. C C. 685. It said:

> (p. 699) "Besides the common-carrier bus operating over a regular route and between fixed termini, there are common carriers holding themselves out to transport passengers by motor vehicle *'anywhere for hire.'"*
>
> (p. 705) "Truck operations fall into one of three general classes: * * * (3) the *common-carrier truck,* which (a) operates on schedule over a regular route or between fixed termini, and usually at published rates from which it may not depart, and (b) *the so-called anywhere-for-hire carrier."*

In 1930-31 Examiner Flynn made a further investigation in I. C. C. Docket No. 23400, "Coordination of Motor

Transportation." 182 I. C. C. 263; 1931 Annual Report of I. C. C. 81. His report was printed as Senate Document No. 43, 72nd Congress, 1st Sess. His conclusions and recommendations, among others, were the following (pp. 115-117):

"17. Regulation of interstate transportation of property by motor vehicles for hire, operating on the public highways in interstate commerce, should be provided for by law. Classification for the purposes of regulation should be made on the basis of: (a) Those operating over regular routes or between fixed termini, (b) *those operating as anywhere for hire common carriers*, and (c) those operating as motor-vehicle contract carriers.

"18. Legislation for the regulation of motor-vehicle lines operating as common carriers of persons or property on the public highways, *except anywhere-for-hire carriers*, should provide as prerequisites to the commencement of such operation: (a) Certificate of convenience and necessity and (b) liability insurance or indemnity bond or satisfactory financial responsibility that will assure adequate protection for the responsibility assumed."

"21. The law should provide that the fact that an applicant for a certificate of public convenience and necessity was in bona fide operation as a common carrier over the route or between the termini described in the application for a reasonable length of time prior to the enactment of regulatory legislation and continuously to the time application is made has so been in operation should be considered prima facie evidence of the public convenience and necessity of such operation. If satisfactory showing is made that such applicant is able adequately to perform the service required, a certificate should be issued to the applicant without further proceedings."

"30. *Anywhere-for-hire common carriers* engaged in transportation of interstate commerce by motor vehicle on the highways should be required to register with the Interstate Commerce Commission, and upon proof of compliance with such requirements as may

be appropriate for the regulation of carriers of that class, be entitled to a permit setting forth such fact. One of the requirements should be the carrying of liability insurance or filing of an indemnity bond to secure the public in cases of personal injury o· property damage. Permits should be issued for a definite period."

The Commission's report in this proceeding contained the following recommendation, among others (182 I. C. C. 386):

"2. Transportation of property for hire by *motor trucks* operating over the public highways in interstate commerce should be subjected by law to reasonable public regulation. Carriers should be divided into two general classes, common carriers and contract (private) carriers. The first should include all carriers who undertake for hire to transport from place to place, over the public highways, by motor vehicle in interstate commerce, the property of those who may choose to employ them. The second should include all carriers not within the discription of common carriers."[80]

80. "The terms 'common carrier,' 'contract carrier,' 'private carrier for hire,' and 'privately owned or operated trucks' refer largely to a practical classification of truck operation. Legally speaking, there are only two classifications of motor-truck operations for hire, namely, common carrier and private carrier."

The foregoing is couched in exceedingly general terms. It may be that the Commission meant that the first class includes only regular route carriers (calling them common carriers as a "practical classification" as stated in the footnote); and that the second class comprised all others, including its own and Examiner Flynn's classification of "anywhere-for-hire" carrier. Or perhaps the Commission meant that the first class includes all common carriers of every type. In either case there is no disapproval of Examiner Flynn's recommended inclusion of the "*anywhere-for-hire*" classification, or of its own previous adoption of this classification in 1928 in 140 I. C. C. 685, 705.

The Interstate Commerce Act, in the respects now under consideration, is precisely contrary to the recommendations of Examiner Flynn, and of the Interstate Commerce Commission in 1928 and 1932 as far as they went. Examiner Flynn recommended (17) that motor common carriers of property be classified as (a) those operating over regular routes or between fixed termini and (b) *"anywhere-for-hire"* carriers: (18) that motor common carriers, *except anywhere-for-hire carriers*, be required to obtain certificates of convenience and necessity: (21, 30) that existing carriers *other than anywhere-for-hire carriers* have "grandfather" rights which would make unnecessary proof of convenience and necessity; and (30) that anywhere-for-hire carriers be permitted to operate without showing convenience and necessity *but for a definite period only.*

In the following four important items the Motor Carrier Act is contrary to Examiner Flynn's recommendations with respect to common carriers not operating over regular routes nor between fixed termini. (1) The Act requires a showing of convenience and necessity by carriers *not* operating over regular routes nor between fixed termini; (2) except that it gives "grandfather" rights to carriers of that class who can qualify. (3) The operating rights granted to that class of carriers are permanent and not for a fixed period. (4) Having done (2) and (3) it was impossible to classify any carriers as "anywhere-for-hire," as that would authorize the granting of innumerable permanent "grandfather" rights to the whole United States.

Therefore, instead of authorizing the "anywhere-for-hire" classification Congress provided in Section 208 (a) that "in case of operations not over specified routes or between fixed termini" the operations of motor common carriers should be delimited by confining them to "the territory within which" they would be permitted to operate. In "grandfather" cases that is the "territory" in which

they have been in bona fide operation during the required period. Section 206 (a).

*It is highly important to note that the reasons which impelled Congress to give "grandfather" rights to carriers not operating over regular routes nor between fixed termini also required that such grandfather rights be expressly delimited to the actual territory in which the applicant was in bona fide operation during the grandfather period.* That there must be such limitation is obvious; and the history of the change from the idea of anywhere-for-hire carriers with no "grandfather rights" to carriers with definite territory with "grandfather rights" shows, along with other evidence, that the word "territory" as used in the Act should be strictly construed to carry out the purpose evident in this legislative history. That purpose was to avoid the "anywhere-for-hire" classification, and instead to limit "grandfather rights" applicants not operating over regular routes nor between fixed termini to their actual operations, the precise territory they were serving, during the "grandfather" period, that is, on and after June 1, 1935.

The phrase "anywhere-for-hire" does not appear in the Interstate Commerce Act. No equivalent of that phrase appears either, except in a rather limited form applicable to *passenger* carriers only in Section 208 (c):

> "(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to *any place* special or chartered parties under such rules and regulations as the Commission shall have prescribed." (Emphasis supplied.)

The inclusion of passenger carriers in the category of those who may, even in that limited way, transport to "any place," with no corresponding or equivalent clause relating to property carriers, excludes the latter class from any right to the status of anything resembling "anywhere-for-hire" carriers, and denies to the Commission any power to confer that status.

(G) SUMMARY OF EVIDENCE WITH RESPECT TO OTHER STATES: ARKANSAS, TEXAS, TENNESSEE, KENTUCKY, ALABAMA, GEORGIA, NORTH CAROLINA, SOUTH CAROLINA.

We have discussed the applicable principles of law in detail with respect to Washington, Oregon, and California. We now summarize the evidence as to the other states, without repeating legal argument.

ARKANSAS.

The District Court annulled the part of the order authorizing service to Arkansas (R. 33, 36). Because this part of the decree is before the Court on cross-appeal we discuss Arkansas here.

At the time of the hearing Fleming's only claim as to Arkansas was that he had served Texarkana, in the southwest corner on the line between Arkansas and Texas. His shipping bills show shipments of five vehicles to Texarkana on March 9, 1935, and five on April 3, 1935 (R. 92). The supplemental list shows five vehicles on March 9, 1935 (evidently the same five above referred to), and fifteen on May 12, 1935 (R. 110). His only testimony on this point is: "In Arkansas we have one place in Texarkana, but we do not serve any other dealers in the state and were not in 1935" (R. 103).

Texarkana has a population of 11,821. In the center of the state is Little Rock (north and south) with a population of 109,176. Northwest of Little Rock is Fort Smith with 36,584. A short distance from Little Rock are Hot Springs and Pine Bluff, each with over 20,000. In the northeastern part of the state are Blytheville and Jonesboro, each with over 10,000 population.

Here again the error of the Commission in its construction of the Act is evident in that it considered all of

Arkansas, including all of the above named cities, to be in the "territory" of Texarkana.

But a more fundamental error is the Commission's finding that Fleming, on June 1, 1935, and since that time, was operating as a common carrier to any point in Arkansas. His last shipment to Arkansas was on May 12, 1935, more than fourteen months before the date of the hearing. Any common carrier who makes no deliveries to a state from May 12, 1935, to July 23, 1936, the date of his "grandfather" clause hearing, could not have been in bona fide operation on June 1, 1935, and have "so operated since that time."

TEXAS.

The shipping bills show shipments to the following Texas points (R. 95):

On or before June 1, 1935.

| | | |
|---|---|---|
| January 3, 1935 | Tyler | 1 Terraplane<br>3 Hudsons |

After June 1, 1935.

| | | |
|---|---|---|
| December 21, 1935 | Laredo | 2 Hudsons<br>4 Terraplanes |
| January 3, 1936 | Marshall | 2 Hudsons<br>3 Terraplanes |
| January 3, 1936 | Paris | 4 Terraplanes |

The supplemental list shows (R. 117-118):

Before June 1, 1935.

| | | |
|---|---|---|
| April 22, 1935 | Ennis | 2 Vehicles |
| May 17, 1933 | Ft. Worth | 2 Vehicles |
| July 20, 1933 | Ft. Worth | 12 Vehicles |
| December 18, 1933 | Ft. Worth | 2 Vehicles |
| May 8, 1935 | Ft. Worth | 6 Vehicles |
| October 4, 1933 | Itasca | 2 Vehicles |
| November 16, 1933 | Itasca | 2 Vehicles |
| February 16, 1935 | San Antonio | 2 Vehicles |

After June 1, 1935.

| | | |
|---|---|---|
| April 1, 1936 | Colorado | 2 Vehicles |
| July 31, 1935 | Laredo | 2 Vehicles |
| January 14, 1936 | Laredo | 4 Vehicles |
| January 28, 1936 | Laredo | 7 Vehicles |
| March 2, 1936 | Laredo | 2 Vehicles |
| May 15, 1936 | Laredo | 5 Vehicles |
| July 15, 1936 | Laredo | 4 Vehicles |
| December 14, 1935 | Marshall | 4 Vehicles |
| February 1, 1936 | Marshall | 5 Vehicles |
| July 10, 1936 | Marshall | 6 Vehicles |
| July 15, 1936 | Marshall | 2 Vehicles |
| January 3, 1936 | Paris | 4 Vehicles |
| July 16, 1936 | Paris | 4 Vehicles |
| May 1, 1936 | Sherman | 4 Vehicles |
| November 13, 1935 | Tyler | 4 Vehicles |
| November 23, 1935 | Tyler | 4 Vehicles |
| December 5, 1935 | Tyler | 6 Vehicles |
| December 21, 1935 | Tyler | 4 Vehicles |
| January 3, 1936 | Tyler | 4 Vehicles |
| April 10, 1936 | Tyler | 4 Vehicles |

Fleming's testimony relative to Texas is the following:

I served used car dealers in Fort Worth, Texas, in 1934; that was my first movement into Texas. I am not now handling used cars. I am not now engaged in handling that business for those persons at Fort Worth. I serve the Automobile General Corporation of Dallas, dealers in Hudson Terraplanes, and the Hudson Terraplane dealer at Paris and Marshall in Texas. I had been serving the dealer at Dallas something like over a year, prior to June 1, 1935. I have a record of that. I began to serve the dealer at Paris and the dealer at Marshall subsequent to June 1, 1935. We have made deliveries on a few occasions to the Orsinger Motor Company at San Antonio, a Hudson Terraplane dealer. We are not now doing business with him. I believe we made two or three deliveries to him. I would say that his business was an open account on June 1, 1935. The last shipment I handled for him was sometime prior to June 1, 1935. We have not served any other dealers in San Antonio. I say the

> Orsinger Motor Company was an open account because we were holding ourselves ready to serve him because we had served him in the past, and we were ready to serve him. He was considered one of our standing accounts. I did not give consideration as to any definite time. Any time I do business with any one individual I am willing to do business with him again. I do have a very few written contracts with my customers, other than at Portland. I do not have a written contract with the Orsinger Motor Company. I handled two or three small shipments for them. I believe those are about the only points in Texas that we served. We go there continuously, though, and have for some time (R. 102-103).

A careful examination of Fleming's presentation of his testimony as to Texas, a state of immense distances and large cities, will demonstrate that he did not establish "grandfather" rights to any points in that state. If he really had been serving that vast territory prior to June 1, 1935, and continuously since that time, he assuredly would have made a better showing in the representative shipping bills attached to his application. These show only one shipment to Texas prior to June 1, 1935, 4 vehicles, on January 3, 1935, to Tyler, a city of 28,279 population in the northeastern part of the state, but no shipments after that to Tyler.

With reference to Ft. Worth, Fleming's testimony shows that the shipments to that point were used cars to used car dealers, and that he is not now hauling used cars nor serving those dealers. That is all of the testimony regarding Ft. Worth and that plainly relates to the shipments shown on the supplemental list.

With respect to San Antonio, the supplemental list shows the shipment of two vehicles on February 16, 1935. Fleming stated in his oral testimony that he had made a few deliveries to one dealer there prior to June 1, 1.35, but none subsequent to that date.

With respect to Dallas, population 294,734, Fleming furnished no shipping bill proof whatsoever as to operation to that important city. Dallas is not shown on the supplemental list. His testimony was apparently intended to convey the thought that he is now serving Dallas and that he had been serving the Hudson-Terraplane dealer there for more than a year prior to June 1, 1935. It is submitted that his character of proof is not sufficient to establish "grandfather" rights to Dallas, and thereby avoid a showing of public convenience and necessity for service to that place. *It is further submitted that it is singular, indeed, that Fleming could and did furnish rather detailed information as to operations which he had discontinued long before the hearing, but could not and did not furnish any shipping bill or other evidence as to operation to the only city in Texas, Dallas, which he claimed to be actually serving at the time of the hearing.*

However, if we assume for purpose of argument that Fleming established that he was on June 1, 1935, serving all of the cities named, and had continued to serve them since that time, it most certainly follows that even that showing does not establish that the "territory" he was serving by virtue of service to such cities was the entire state of Texas. Houston (pop. 384,514), Galveston (pop. 60,862), Amarillo (pop. 51,686), El Paso (pop. 96,810), Port Arthur (46,140), Beaumont (59,061), are all more than 193 miles from any city in Texas mentioned in Fleming's evidence, and the farthest is 500 miles away.

TENNESSEE.

We do not complain of the order of the Commission insofar as it found that Fleming had "grandfather" rights to Knoxville and Chattanooga in Tennessee. The shipping bills attached to Fleming's application to the Commission (R. 95) show a series of shipments to these two cities

before June 1, 1935 and one shipment to each in December, 1935. No other Tennessee point is mentioned in these shipping bills.

The supplemental statement (R. 116-117) also shows a rather continuous series of shipments to these same two cities, Chattanooga and Knoxville, both before and after June 1, 1935.

Now it is highly significant that the only two cities in Tennessee which are found either in the shipping bills at all, or in the supplemental list prior to June 1, 1935, are Chattanooga and Knoxville. The only other shipments to Tennessee shown in any way in the evidence are the following, all subsequent to June 1, 1935, shown in the supplemental list:

| | | |
|---|---|---|
| June 16, 1936 | Elizabethton | 2 Vehicles |
| July 9, 1935 | Kingsport | 2 Vehicles |
| July 16, 1935 | Kingsport | 2 Vehicles |
| December 14, 1935 | Kingsport | 2 Vehicles |
| October 8, 1935 | Nashville | 4 Vehicles |

Knoxville (pop. 111,580) and Chattanooga (pop. 128,163) are both in the eastern part of Tennessee. Kingsport (14,404) and Elizabethton (8,516) are both in the extreme northeast corner of Tennessee.

Most assuredly the "territory" of Knoxville and Chattanooga does not include Nashville (pop. 167,402) in the central part of the state or Memphis (pop. 292,942) in the southwestern corner of the state. The only shipment to Nashville shown in all of the evidence was four vehicles on October 8, 1935. No shipments were shown to Memphis. It is plain that the Commission was in error in authorizing service based on "grandfather" rights to Nashville and Memphis; that is, to any other part of Tennessee than that included in the strip on the eastern edge of the state wherein lie Knoxville and Chattanooga.

Fleming's only oral testimony with respect to Tennessee was the following:

We have moved in Tennessee continuously; that was at the inception of my business (R. 105).

Certainly that broad statement cannot be a substitute for detailed evidence. Particularly is this true in view of the good showing made as to Chattanooga and Knoxville. Even in his supplemental statement Fleming could not show any shipment to Memphis and could only show one to Nashville, more than four months after June 1, 1935. It is 115 miles from Chattanooga to Nashville; 165 miles from Knoxville to Nashville and 265 miles from Chattanooga to Memphis.

KENTUCKY

The shipping bills show the following shipments to Kentucky points (R. 93):

On or before June 1, 1935.

| | | |
|---|---|---|
| April 17, 1935 | Corbin | 2 Dodges |
| June 15, 1934 | Louisville | 1 Dodge Truck |
| May 29, 1934 | Williamsburg | 2 Hudsons |
| July 27, 1934 | Williamsburg | 2 Hupmobiles |
| May 7, 1935 | Williamsburg | 4 Dodges |
| May 16, 1935 | Corbin | 1 Dodge |
| | Williamsburg | 1 Plymouth |

None after June 1, 1935.

The supplemental list shows the following shipments prior to June 1, 1935 (R. 112-113):

| | | |
|---|---|---|
| April 17, 1935 | Corbin | 2 Vehicles |
| June 15, 1934 | Louisville | 1 Vehicle |
| September 1, 1933 | Williamsburg | 2 Vehicles |
| October 23, 1933 | Williamsburg | 2 Vehicles |
| December 9, 1933 | Williamsburg | 2 Vehicles |
| December 27, 1933 | Williamsburg | 2 Vehicles |
| August 28, 1934 | Williamsburg | 3 Vehicles |
| October 11, 1934 | Williamsburg | 1 Vehicle |

| | | |
|---|---|---|
| December 29, 1934 | Williamsburg | 2 Vehicles |
| March 2, 1935 | Williamsburg | 1 Vehicle |
| May 7, 1935 | Williamsburg | 4 Vehicles |
| May 29, 1935 | Williamsburg | 1 Vehicle |

After June 1, 1935.

| | | |
|---|---|---|
| June 7, 1935 | Corbin | 1 Vehicle |
| February 12, 1936 | Louisville | 1 Vehicle |
| July 3, 1935 | Williamsburg | 1 Vehicle |
| August 14, 1935 | Williamsburg | 2 Vehicles |
| October 8, 1935 | Williamsburg | 1 Vehicle |
| November 16, 1935 | Williamsburg | 1 Vehicle |
| December 6, 1935 | Williamsburg | 1 Vehicle |
| December 18, 1935 | Williamsburg | 3 Vehicles |
| January 17, 1936 | Williamsburg | 2 Vehicles |
| February 8, 1936 | Williamsburg | 1 Vehicle |
| March 4, 1936 | Williamsburg | 1 Vehicle |
| April 7, 1936 | Williamsburg | 2 Vehicles |
| April 17, 1936 | Williamsburg | 1 Vehicle |
| May 2, 1936 | Williamsburg | 1 Vehicle |
| June 20, 1936 | Williamsburg | 1 Vehicle |
| July 10, 1936 | Williamsburg | 3 Vehicles |
| July 18, 1936 | Williamsburg | 2 Vehicles |

We do not dispute the Commission's action in authorizing service to Williamsburg (pop. 2,331), in the southeastern corner of the state. The shipping bills and the supplemental statement show a fairly continuous series of shipments. Here again, however, this excellent showing as to one small town in the state 138 miles from Louisville contrasts significantly with his showing as to that city or any other important city in the state. If he had been able to make such a showing as to Louisville or any other city he assuredly would have done so. He testified as to Kentucky:

> In Kentucky we serve accounts in Louisville and Williamsburg; we served them on June 1, 1935, and still serve them (R. 105).

Leaving Louisville for a moment, the only other city mentioned in Fleming's evidence is Corbin (pop. 7,893) also in the southeastern corner of the state about 15 miles north of Williamsburg. As to Corbin the showing is even better than Louisville, there having been shipments shown to Corbin of 2 vehicles on April 17, 1935, one on May 16, 1935, and one on June 7, 1935. Fleming's statement in his oral testimony shows that "since that time" he has not served Corbin.

Coming now to Louisville the best showing as to actual shipments which Fleming could make, either in the shipping bills attached to his application or in the supplemental statement was one Dodge truck to Louisville on June 15, 1934 (shown in both of the foregoing), and one vehicle on February 2, 1936 shown in the last filed supplemental statement.

It is submitted that this showing entitled Fleming to no other "grandfather" rights in Kentucky except to Williamsburg and that town's actual trade territory. That is the only territory Fleming was serving in Kentucky as a common carrier on and since June 1, 1935. In no event could the foregoing evidence be said to show that the territory Fleming was serving was the entire State of Kentucky.

ALABAMA.

We do not dispute the order of the Commission insofar as it authorizes service to Birmingham, Alabama. Both the shipping bills and the supplemental list show a fairly continuous series of shipments to that city both before and after June 1, 1935 (R. 92, 109-110). As we have pointed out with respect to other states, however, the excellent showing as to Birmingham and the complete lack of a similar showing to any other city should most assuredly be taken into consideration by the Court.

Fleming testified orally as follows:

> In Alabama I serve a Hudson Terraplane dealer named Cullman in Gadsden. I have been doing business with him since some time prior to June, 1935. This is my fourth year doing business for the distributor at Birmingham, a Hudson Terraplane dealer, and with the Hudson Terraplane distributor at Montgomery. The Hobby Motor Company. I have had a contract to deliver Packard cars at Montgomery for the past two years. Then there is the Apt Motor Company at Birmingham. I believe I do not serve any other consignees in Alabama but I am not positive (R. 104).

However, the foregoing testimony is fully explained by Fleming's supplemental list (R. 109-110). From that list it will be seen that service to all of the points named, except Birmingham, started after June 1, 1935. We must take this to be so because no shipments are shown to these points on Fleming's shipping bills or supplemental list except those after June 1, 1935; and if there had been shipments before that date he assuredly would have shown them on one list or the other, considering the fact that as to some points he shows on both lists a considerable number of shipments prior to June 1, 1935.

It is thus established by undisputed evidence that Birmingham was the only city in Alabama which Fleming was serving on or prior to June 1, 1935. This showing was plainly insufficient as a matter of law to warrant the finding of the Commission that on June 1, 1935 he was serving other "territory" comprising the entire State of Alabama, including the cities of Mobile (pop. 78,720), Montgomery (pop. 78,084), Selma (pop. 19,834), Decatur (pop. 16,604), or the many other sizeable cities of the state. It is 210 miles from Birmingham to Mobile, and 85 miles from Birmingham to Montgomery.

GEORGIA.

Fleming testified as follows with reference to Georgia:

> In the State of Georgia we have many accounts. I cannot enumerate them all; the largest is J. W. Goldsmith at Atlanta, a Hudson-Terraplane dealer. We deliver Dodge trucks at Savannah (R. 104).

The shipping bills and the supplemental list show a more or less continuous course of shipments both before and after June 1, 1935, to Atlanta, Augusta, Columbus, Savannah, Albany and Macon (R. 93, 110-112) and we do not contest the order of the Commission insofar as it authorized service to those points.

The Commission found that Fleming had shown service to seven points in Georgia during the "grandfather" period. Apparently the seventh point must have been Rome. Only two shipments to Rome are shown prior to "grandfather" date, on January 16 and February 15, 1935, and one appears in August, 1935. We submit that these first two shipments were not sufficient to establish that Fleming was in operation to Rome on June 1, 1935; but in any event the one shipment in August, 1935, does not suffice to show continuous service "since that time".

It is submitted that defendant Fleming failed to show that the "territory" he was operating in on June 1, 1935, and has continued to serve since that time, is the entire State of Georgia.

NORTH CAROLINA.

Fleming's only oral testimony as to North Carolina is the following: In North Carolina we deliver Grahams at Winston-Salem and Hudson Terraplanes in that state (R. 104).

The shipping bills and the supplemental statement show a fairly regular, though not numerous, course of ship-

ments to Asheville and Charlotte, both before and after June 1, 1935; and we do not contest the Commission's order insofar as it authorizes service to those two points (R. 94, 113-114).

The shipping bills and the supplemental list show service prior to June 1, 1935, to only one other point in the state, Raleigh, as follows:

On or before June 1, 1935.

| | | |
|---|---|---|
| November 21, 1934 | Raleigh | 6 Terraplanes |
| | | 1 Hudson |
| February 21, 1935 | " | 9 cars |
| April 22, 1935 | " | 5 vehicles |
| May 9, 1935 | " | 4 Hudsons |
| May 29, 1935 | " | 12 vehicles |

After June 1, 1935.

| | | |
|---|---|---|
| August 7, 1935 | Raleigh | 4 vehicles |
| August 22, 1935 | " | 4 vehicles |
| October 16, 1935 | " | 4 vehicles |
| November 27, 1935 | " | 3 Hudsons |
| | | 1 Terraplane |

It will be noted that the last shipment to Raleigh was on November 27, 1935. With no shipments to that point since that date it cannot be said that Fleming had continued to serve that point from June 1, 1935, to the date of the hearing, July 23, 1936.

Asheville and Charlotte are both in the western half of the state, and proof of operation to them sufficient to qualify Fleming for "grandfather" clause authority certainly does not establish that he was serving the "territory" in which is found Wilmington on the coast (pop. 33,407); Winston-Salem in the north central part (pop. 79,815); Durham (pop. 60,195) or Greensboro (pop. 59,319).

SOUTH CAROLINA.

With reference to his operations in South Carolina defendant Fleming testified:

> We serve practically every city in South Carolina. Besides Hudsons and Terraplanes we delivered some Dodge trucks and Dodge and Plymouth cars. We delivered Grahams at Wilmington and Charleston (R. 104).

We do not contest the order of the Commission insofar as it authorized service to Columbia and Hartsville. Both the shipping bills and the supplemental list (R. 95, 114-116) show consistent service to those points both before and after June 1, 1935. That showing is again to be contrasted with the weak showing or the absence of showing as to other cities which the Commission held Fleming was serving on the "grandfather" date.

Shipments to other points in South Carolina than Columbia and Hartsville, as shown by the shipping bills and supplemental list, are the following:

On or before June 1, 1935.

| | | | |
|---|---|---|---|
| April 3, 1935 | Anderson | 2 | Vehicles |
| July 14, 1933 | Charleston | 4 | " |
| November 30, 1933 | " | 2 | " |
| April 4, 1934 | Greenwood | 2 | " |
| April 4, 1935 | " | 2 | " |
| September 13, 1934 | Lake City | 2 | " |

After June 1, 1935.

| | | | |
|---|---|---|---|
| November 8, 1935 | Anderson | 4 | Vehicles |
| January 31, 1936 | Greenville | 4 | " |
| June 25, 1936 | Spartanburg | 2 | " |
| July 11, 1936 | " | 2 | " |

It will be observed that the only points in the above list to which service was performed prior to June 1, 1935, are Charleston, Lake City and Greenwood, where cars were

delivered in 1933, 1934, and April, 1935, and none since; and Anderson where deliveries were made on April 3, 1935 and November 8, 1935. As to these cities, therefore, if any inchoate "grandfather" rights accrued prior to June 1, 1935, they were lost by failure to operate to those points "since that time".

Charleston (pop. 71,275) is 110 miles from Columbia (pop. 62,396) and Hartsville (pop. 5,399). It is assuredly not in the "territory" of those two cities. They are nearer to Charleston than any other points shown in the evidence to have been served, except Lake City (pop. 2,522), 80 miles north of Charleston. The deliveries to Charleston consisting of four vehicles in July, 1933 and two in November, 1933, do not warrant the granting of any "grandfather" rights to Charleston.

3.

APPELLEE FLEMING WAS OPERATING IN CERTAIN TERRITORY IN INTENTIONAL VIOLATION OF LAW BEFORE AND AFTER JUNE 1, 1935, AND THE COMMISSION THEREFORE ERRED IN HOLDING THAT HE WAS IN BONA FIDE OPERATION IN THAT TERRITORY.

(A) FLEMING HELD A CONTRACT CARRIER PERMIT ISSUED BY THE STATE OF OREGON AND WAS A CONTRACT CARRIER THERE AND NOT A COMMON CARRIER DURING THE "GRANDFATHER" PERIOD.

In Oregon appellee Fleming was not in bona fide operation as a common carrier, because he was, during the "grandfather" period, in operation there by his own choice as a *contract carrier*. It was and is impossible, under both the Oregon statutes and the Motor Carrier Act for him to have been a common carrier there when he was a contract carrier there.

On this point he testified:

"I am familiar with the requirements of the law of

Oregon for my operations. I secured a contract carrier permit from the Public Utilities Commission of the State of Oregon about January 10, 1936. I secured an Oregon dealers license in 1935 for my automobiles. I did not secure any other permit or certificate for operation in the State of Oregon at any time prior to January 10, 1936." (R. 99-100.)

"Q. You were a contract carrier, held a contract carrier permit in Oregon, but you were not a common carrier, is that correct?

"A. Correct." (R. 101.)

He testified that with his application for a contract carrier permit to operate in Oregon he filed a copy of his written contract with Cohen-Anderson Motor Company, and filed no other contract. At the time of the hearing (July 23, 1936) he had no other consignee in Oregon except that company. His present arrangement in Oregon is all for delivery of Hudsons and Terraplanes and it was the same prior to June 1, 1935. At the direction of this company, however, he had made a delivery on or prior to June 1, 1935, to Klamath Falls or Salem (R. 101).

It is therefore evident that since January 10, 1936, at the latest, until the time of the hearing, defendant Fleming was an interstate contract carrier in Oregon and not a common carrier. It seems apparent that he was also a contract carrier in Oregon prior to January 10, 1936. But whatever his status prior to January 10, 1936, his legal status since then by his own choice has been that of a contract carrier by virtue of obtaining a permit as a contract carrier. His status as a contract carrier since January 10, 1936, is sufficient to defeat any claim under the "grandfather" clause to common carrier rights in Oregon. He admitted to contract carrier status at the hearing and never made any claim that he was a common carrier in Oregon.

A sequence of dates is of interest. On January 10, 1936, he applied for and obtained from the State of Oregon a contract carrier permit, and never had any other author-

ity from the State of Oregon to operate as a motor carrier. On February 5, 1936, he executed under oath his application for "grandfather" rights authority as a common carrier (R. 57).

If he was in good faith when he applied to the Oregon Commission for a contract carrier permit, which he secured about January 10, 1936, and if he in good faith operated as a contract carrier under such permit since that time, obviously he was not operating since that time in good faith as a common carrier. On the other hand, if at the time he applied to Oregon for a contract carrier permit, and at the time he received the same on January 10, 1936, he was not in fact a contract carrier but a common carrier, and if he continued to operate as a common carrier under that contract carrier permit, then plainly enough he was not operating in good faith in any respect. In either of these situations, and one or the other must necessarily have been true, he was not operating "since that time" in good faith as a common carrier.

The case is ruled at this point by both *McDonald* v. *Thompson*, 305 U. S. 263, and *United States* v. *Maher*, 307 U. S. 148, both discussed in division 2. In the *McDonald* case the "grandfather" application was denied because the carrier was operating in violation of law, hence not in bona fide operation.

In *United States* v. *Maher*, Maher's "grandfather" application was denied because the operation he was conducting at the time of his hearing was a different one from that he had been carrying on on June 1, 1935. Applying that case to this one, Fleming's sworn application states that he was on June 1, 1935, operating in Oregon as a common carrier. If that is true, he nevertheless abandoned that operation on January 10, 1936, to become a contract carrier, and he has remained a contract carrier ever since. As the Court said in the *Maher* case (307 U. S. p. 155):

"Since the new regular route of appellee was not in

existence on June 1, 1935, and the irregular 'anywhere-for hire' service was not 'so operated,' as required by Sec. 206, when the Commission passed upon the application for a 'grandfather' certificate, the Commission rightly rejected the application."

The Interstate Commerce Act distinguishes between and classifies separately common and contract carriers. See Sections 203(a) (14) and (15), 204(a), 206, 209, and elsewhere. So do the laws of Oregon. See (in Appendix A hereto) Sections 55-1342 (f) and (g), 55-1347, and 55-1349, 1935 Supplement to Code of Oregon.

(B) WHILE OPERATING MOTOR VEHICLES THROUGH NEBRASKA APPELLEE FLEMING CLAIMED THAT THE VEHICLES WERE HIS OWN IN ORDER TO ESCAPE PAYMENT OF LICENSE FEES.

Appellee Fleming showed by his own testimony that his operations through Nebraska were being conducted in violation of law to escape payment of license fees due Nebraska. His testimony on this is the following (R. 100):

When I take possession of cars for delivery from the point of manufacture to destination the title to the cars is in the dealer. The dealer is the one who employs me. I solicit the dealer for the business.

Q. In no event are you still performing these services and transporting these cars where you are the owner of the vehicles?

A. Yes, I am. In my operation at this particular time I am the owner of vehicles when they pass through the State of Nebraska.

Q. You are the owner of the vehicles when they pass through the State of Nebraska, because by a ruling of the Nebraska Department they require vehicles to be registered in the name of the owner and the plates can then be transferred from one vehicle to another by the mere payment of a $1.50 fee, is that right?

A. That is right.

Q. Then in order to save the necessity of buying new plates for any dealer and standing the expense of new plates, you contend that you are the owner of those vehicles when you pass through Nebraska?

A. In title, yes.

Q. In title? And where did you pay for it?

A. I didn't pay.

Q. As a matter of fact, you did not pay for them. You took a bill of sale to them?

A. No, I did not take a bill of sale.

Q. As a matter of fact, when you got to Nebraska you merely contended that you were the owner so that you might use these plates of John P. Fleming Drive-away?

A. That is entirely it, but in Nebraska they file applications, and this law only takes that, if this is the proper way, only in so far as we meet their requirements.

Q. Well, aside from that so-called arrangement in Nebraska, you are not the owner in any of the other states?

A. No.

This shows wilful violation of law to avoid payment of state taxes, and therefore lack of bona fides. However, if it be urged that he was not violating the law, but that by some legerdemain he was owner of the vehicles, then in that case he was not moving them as a common carrier. In either case he was not "in bona fide operation as a common carrier by motor vehicle * * * within the territory for which application is made * * *." (Sec. 206 (a).)

In a case having some similarity the Commission denied an application for "grandfather" rights on the ground that the applicant was not in *bona fide* operation, saying, *M. L. Peterson Common Carrier Application*, 14 M. C. C. 443, 446:

"Applicant admits that the system of buying and selling the goods transported was entered into and continued solely for the purpose of creating a transporta-

tion business. It is apparent that the scheme of operation was one designed to cover up the true nature of the business by making it appear to be one of private carriage, when in fact it was not, so that he would be able to operate unmolested as a motor carrier for hire without the necessity of complying with existing state laws requiring that certificates or permits be obtained authorizing such operations for hire over the public highways."

## Conclusion.

We think it apposite here to quote from *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*, *supra* (286 U. S. 299, 312):

> "In cases where an appreciation of the facts is requisite to proper classification it is not always easy to draw the line. Instances may be supposed where great difficulty might be experienced in determining whether an electric railway line falls within or without the exception of paragraph (22). But this is not such a case. The facts clearly require a holding that petitioner's railway is not within the true intent and purpose of the exclusion intended by the paragraph."

We believe that the undisputed facts and the plain law are so overwhelmingly against the Commission's order that this is a case where it is "easy to draw the line." No doubt there are borderline cases where the scales may be tipped by the principle of administrative discretion but this is clearly not one of them.

Respectfully submitted,

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# APPENDIX A.

(Parts of 1935 Supplement to Code of Oregon.)

SEC. 55-1342. Definitions.

(f) "Common carrier" means any person who transports for hire or who holds himself out to the public as willing to transport for hire, compensation or consideration by motor vehicle, from place to place, persons or property, or both, for those who may choose to employ him.

(g) "Contract carrier" means any person engaged in transportation by motor vehicle of persons or of property, or of both, for compensation, under special and individual agreements, leases, or other arrangements, and not included in the term common carrier as hereinbefore defined.

SEC. 55-1347. Contract Carriers Regulated.

The commissioner hereby is vested with power and authority, and it shall be his duty, to supervise and regulate all contract carriers of persons or of property, or of both, as defined in section 2 (par. 55-1342) of this act, and, with respect thereto, exercise and perform all and singular the powers and duties stated as sub-paragraphs (a), (b), (c), (f) and (g) in subdivision 1 of section 6 of this act (par 55-1346), except that he shall not require contract carriers to be or become common carriers. Every contract carrier hereby is forbidden to give or cause any undue or unreasonable advantage or preference to those whom he serves as compared with patrons of any common carrier or to subject the patrons of any common carrier to any undue or unreasonable discrimination or disadvantage or by unfair competition to destroy or impair the service

or business of any common carrier or the integrity of the state's regulation of any such service or business; and, to the end that the commissioner may inforce these provisions, each such contract carrier shall file with the commissioner copies of his contract, immediately upon the making of said contract, including the rates, fares, charges and practices called for or contemplated in the performance of the contract, for review and revision and subsequent approval or modification as to rates, fares, charges and practices by the commissioner, and the commissioner shall be empowered upon receiving same to suspend said rates, fares, charges and practices as to further service under said contract pending investigation thereof by the commissioner, and he, the said commissioner, shall have jurisdiction over said rates, fares, charges and practices to the same extent as is required by sub-division 2 of section 6 (par. 55-1346), Chapter 429, Oregon Laws, 1933, in the case of common carriers, and the provisions of subdivision 2 of section 6 (par. 55-1346), chapter 429, Oregon Laws 1933, are by this reference made applicable to contract carriers and the commissioner shall apply and enforce the same accordingly; provided, that the commission shall have no authority to fix rates on agricultural, horticultural, poultry, dairy, livestock, timber or livestock products in the transportation from the point of origin to or from the packing or processing plants, or to the nearest market or shipping point, when not transported in competition with common carriers and/or railroads. The deposit of a copy of said contract in the postoffice, addressed to the commissioner at Salem, Oregon, with the postage paid thereon, shall for the purpose of this act be deemed a filing and thereupon the carrier may proceed under his said contract unless the same is suspended by the commissioner. The filing of such contract shall be without additional cost to the contract carrier (L. 1933, ch. 429, #7, p. 750; L 1933 (2d Sp. S.), ch. 94, #3, p. 237.)

SEC. 55-1349. Permits—Licenses.

SEC. 55-1349. 1. It shall be unlawful for any person to operate any motor vehicle on any highway in this state as a common carrier, either as a fixed termini or anywhere-for-hire carrier, a contract carrier, private carrier, special carrier in the transportation of persons or property or both without first applying for and obtaining, in addition to the license required by law, a permit from the commissioner covering the proposed operation.

The commissioner shall, in issuing permits, classify the applicants as to their proper class under the law and no carrier shall operate in a different class without permit from the commissioner.

3. Common carriers and contract carriers engaged or to engage exclusively in interstate operations shall make application to the commissioner for permit and pay the application fee as provided for in this act, but the commissioner shall issue permit to them without the necessity for a hearing and as a matter of course, conditioned that they furnish insurance policy as required by this act. Said person so engaged exclusively in the conduct of interstate transportation shall:

(a) Currently pay to the commissioner the road tax mileage fees prescribed by section seventeen (17) and section nineteen (19) of this act;

(b) Observe and comply with the provisions of the laws of this state regulating traffic on its highways, or the operation of motor vehicles thereon, or limiting the size, weight or speed of motor vehicles;

(c) Observe and comply with the laws of this state and with the orders, rules and regulations of the commissioner and of the highway commission to protect the highways from substantial damage and to promote safety to other users thereof and to adjacent property and facilities and to the public.